II.

THE RECOUNT IS INFORMATIVE AND DOES NOT CONFLICT WITH THE RIGHTS OF THE SENATE

As has been previously stated, the recount is used as a vital tool to determine whether the declared winner did, in fact, garner the most votes. Whether the Senate would actually deem itself bound by the results of the recount cannot be predicted with certainty. However, two state courts have expressed confidence that the results of a recount would not be ignored.

> "Respondents and intervenor contend that since Congress, under the provisions of Art. 1, Sec. 5, supra, is the ultimate judge 'of its own Members' it may refuse to seat petitioner notwithstanding a recount of the votes may show that he in fact received more votes than Wheeler. Although Congress may have such power, we do not agree with respondents' suggestion that to accept jurisdiction herein and grant relief we will be doing a vain or futile thing. We are not convinced that Congress will refuse to recognize the result of a recount or a Certificate of Election issued in accordance with the recount. * * *" *Wickersham v. State Election Board*, 357 P. 2d 421, 424-425 (Okla. 1960)

* * *

> "Within the scope of the elective process, our legislature could have provided for a recount of the votes under supervision of our courts when the original tabulation was questioned by one of the candidates. If it had done so as part of the elective process, as many of the other states have done, we do not doubt that Congress would accept the original tally without a recount." *Odegard v. Olson* (1963) 264 Minn. 439, 119 N.W. 2d 717, 721.

Appellee Hartke puts great emphasis on the evidence, which he contends, shows that the recount commission could have committed a "misadventure" in the handling of the election material which would have a harmful effect on the Senate's ability to determine the winner of the election. Yet, the same potential danger is even more likely in the original count. The Senate does not conduct the original vote count, despite the potential danger of "misadventures." The recount is on no different footing in this regard. When carried to its logical conclusion, the appellees' reasoning would require masses of vote counters to be appointed by the Senate in every election to avoid the possibility of any harm to the ballots on the original count, as well as the recount. That is the only way the "integrity" of the ballots could be preserved to the satisfaction of the appellee.

It was stated in the brief of appellant Roudebush, that in *Herbert R. O'Conor v. D. John Markey of Maryland,* Senate Cases, pp. 144-145, the Senate itself impliedly spoke, that if Maryland law had provided for a recount, it would have been unnecessary for the Senate to have conducted the recount.

III.

THE RECOUNT IS A "PROCEEDING IN A STATE COURT"

Appellee Hartke claims that the recount is not a proceeding in a state court. To buttress this theory he has characterized the recount as ministerial, therefore, not a proceeding in a state court.

However, the injunction entered by the district court operated not only to stay the recount itself, but nullified

all the state judicial proceedings in the Marion Superior Court leading up to the recount. The Superior Court judge specifically held, in overruling Hartke's motion to dismiss, that the recount statute was constitutional. This decision, clearly a "proceeding" in a state court, was enjoined by the U.S. District Court.

Viewed as a whole, the activity in the Marion Superior Court which was enjoined by the District Court was clearly a "proceeding in a state court."

Other courts have held a variety of activities to constitute "proceedings in a state court" short of the traditional trial litigation. For instance in *Geiger v. Jenkins* 316 F.Supp. 370 (N.D. Ga. 1970) the court found that a proceeding before the State Board of Medical Examiners to revoke the plaintiff's license to practice was a proceeding in a state court for purposes of applying 28 U.S.C. §2283. In *Drexler v. Walters* 290 F. Supp. 150 (D.C. Minn. 1968) the District Court held that 28 U.S.C. § 2283 barred an injunction against a state-court appointed receiver who was invading the plaintiff's mailbox as part of the enforcement of a divorce judgment. In *Machay v. Nesbett* 285 F.Supp. 498 (D.C. Alaska 1968), a district court held that it was barred by 28 U.S.C. 2283 from enjoining the disciplinary action of the Alaskan Supreme Court in suspending the plaintiff from the practice of law. A district court in New York refused, under 28 U.S.C. 2283 to enjoin various sheriffs from carrying out orders of attachment issued by a local court, finding that they were ministerial officers of New York courts and, as such, could not be enjoined because the sheriff's execution was a "proceeding in a state court." *Nationwide Mutual Insurance Co. v. Vaager* 265 F. Supp. 556, (S.D.N.Y. 1967). In yet another case, a surety had deposited securities with the state insurance commissioner. After a state court held

the surety was liable on a bond, the insurance commissioner sought to sell the securities to recover on the appearance bonds. This was held to be a "proceeding" within the ambit of § 2283 as interpreted by *Hill v. Martin* 296 U.S. 393 (1935). *Resolute Insurance Co. v. State of North Carolina*, 276 F.Supp. 660 (E.D.N.C. 1967). And finally, in *Guerra v. Gonzalez*, 340 F. 2d. 227, (5th Cir. 1965) the Court of Appeals was asked to restrain the holding of "a contest of a city bond election in the District Court of Starr County, Texas." The Court wrote:

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> "The district court dismissed the action on motion of the defendants and the plaintiffs have appealed. The action of the district court was based upon its view that the court was without jurisdiction to enjoin the election contest proceeding in the state court . . .
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> • • •
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> We are satisfied that the suit was rightly dismissed. Section 2283 of title 28, U.S.C., expressly prohibits the granting of an injunction by a federal court staying proceedings in a state court, except in limited circumstances not here present. ***The election contest here involved was a proceeding in a state court within the protection of that statute.***" 340 F. 2d at 228. (Emphasis added.)

These cases implemented *Hill v. Martin, supra;* where this Court said:

> "The prohibition of section 265 is against a stay of 'proceedings in any court of a state.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process." 296 U.S. at 403.

This clear requirement should be applied to the case at hand.

In Indiana a recount proceeding is initiated by filing a petition for recount with the state court. IC 1970 3-1-27-3, as found in Burns' (1969 Repl.), Section 29-5403. The judge may grant consolidation where there is more than one petition pending. IC 1970 3-1-27-4, as found in Burns' (1969 Repl.), Section 29-5404. Also, the judge may allow amendment of the petition. IC 1970 3-1-27-5, as found in Burns' (1969 Repl.), Section 29-5405. The court must approve the filing of a bond for payment of costs. IC 1970 3-1-27-8, as found in Burns' (1969 Repl.), Section 29-5408. The court then grants the petition and appoints the recount commission members. IC 1970 3-1-27-9, as found in Burns' (1969 Repl.), Section 29-5409. The date and place the commission is to convene and begin the recount is fixed by the court. IC 1970 3-1-27-11, as found in Burns' (1969 Repl.), Section 29-5411. The court has the duty of providing for the protection of all ballots, voting machines and tally sheets and making them available to the recount commission. IC 1970 3-1-27-13, as found in Burns' (1969 Repl.), Section 29-5413. When the commission has completed its tally, it makes a certificate showing the total votes received by the candidates and files it with the circuit court clerk who then enters the findings in the order book of the court. The clerk, a ministerial officer of the court, is then required to certify the vote to the secretary of state. IC 1970, 3-1-27-14, as found in Burns' (1969 Repl.), Section 29-5414.

The above features of the recount procedure as provided by statute show that the recount is a "proceeding in a state court" within the scope of *Hill v. Martin*.

CONCLUSION

For the foregoing reasons the decision and order of the District Court should be reversed with directions to dismiss the action.

Respectfully submitted,

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Syllabus

ROUDEBUSH *v.* HARTKE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 70–66. Argued December 13, 1971—Decided February 23, 1972*

Incumbent Senator Hartke was certified by the Indiana Secretary of State to the Governor as the winner of the close 1970 Indiana senatorial election. Candidate Roudebush filed a timely recount petition in state court. The state court denied Hartke's motion to dismiss on the grounds of conflict with the Indiana and Federal Constitutions, and granted the petition for a recount. Hartke sought an injunction against the recount in United States District Court, invoking jurisdiction under 28 U. S. C. § 1343 (3) and claiming that the recount was barred by Art. I, § 5, of the Federal Constitution, delegating to the Senate the power to judge the elections, returns, and qualifications of its members. The three-judge District Court issued the requested injunction. After appeals were filed here, the Senate seated Hartke "without prejudice to the outcome of an appeal pending in the Supreme Court . . . and without prejudice to the outcome of any recount that the Supreme Court might order." Hartke then moved to dismiss the appeals as moot. *Held:*

1. The issue here, whether a recount is a valid exercise of the State's power to prescribe the times, places, and manner of holding elections, pursuant to Art. I, § 4, of the Constitution, or is a forbidden infringement on the Senate's power under Art. I, § 5, is not moot, as the Senate has postponed making a final determination of who is entitled to the office of Senator pending the outcome of this action. Pp. 18–19.

2. The District Court was not barred from issuing an injunction by 28 U. S. C. § 2283, which generally prohibits a federal court from enjoining state court proceedings. Pp. 20–23.

(a) That section does not restrict a federal court from enjoining a state court acting in a nonjudicial capacity. P. 21.

(b) The state court's recount functions are nonjudicial, as they consist merely of determining that the recount petition is correct as to form and appointing recount commissioners. Pp. 21–22.

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*Together with No. 70–67, *Sendak, Attorney General of Indiana* v. *Hartke et al.*, also on appeal from the same court.

(c) The complaint did not seek to enjoin the action of the state court but rather to enjoin the recount commission from proceeding after the court had appointed members of the commission. P. 22.

3. Article I, § 5, does not prohibit a recount of the ballots by Indiana, as the recount will not prevent an independent Senate evaluation of the election any more than the original count did, and it would be mere speculation to assume that Indiana's procedure would impair the Senate's ability to make an independent final judgment. Pp. 23–26.

321 F. Supp. 1370, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, in which BRENNAN, J., joined, *post*, p. 26. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the cases.

Donald A. Schabel argued the cause for appellant in No. 70–66. With him on the briefs was *L. Keith Bulen*. *Richard C. Johnson*, Chief Deputy Attorney General of Indiana, argued the cause for appellant in No. 70–67. On the briefs were *Theodore L. Sendak*, Attorney General, *pro se*, *William F. Thompson*, Assistant Attorney General, and *Mark Peden*, Deputy Attorney General.

John J. Dillon argued the cause for appellees in both cases. With him on the brief for appellee Hartke were *David W. Mernitz* and *James L. Tuohy*.

MR. JUSTICE STEWART delivered the opinion of the Court.

The 1970 election for the office of United States Senator was the closest in Indiana history. The incumbent, Senator R. Vance Hartke (Hartke), was declared the winner by a plurality of 4,383 votes—a margin of approximately one vote per state precinct. On November 16, 1970, 13 days after the election, the Indiana Secretary of State certified to the Governor that Hartke

had been re-elected. On the following day, candidate Richard L. Roudebush (Roudebush) filed in the Superior Court of Marion County a timely petition for a recount.[1] Hartke moved in that court to dismiss the petition, arguing that the state recount procedure conflicted with the Indiana and Federal Constitutions. On December 1, the state court denied the motion to dismiss and granted the petition for a recount. It appointed a three-man recount commission and directed it to begin its task on December 8.

Hartke then filed a complaint in the United States District Court for the Southern District of Indiana asking for an injunction against the recount. He invoked federal jurisdiction under 28 U. S. C. § 1343 (3) [2] and claimed that the recount was prohibited by Art. I, § 5, of the Constitution of the United States, which delegates to the Senate the power to judge the elections, returns, and qualifications of its members.[3] A single district

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[1] Roudebush filed similar petitions in 10 other counties. Recounts in all 11 counties have been postponed, pending the outcome of this cause.

[2] 28 U. S. C. § 1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

The District Court apparently viewed the suit as substantively based upon 42 U. S. C. § 1983, which authorizes a civil action on the part of a person deprived, under color of state law, "of any rights, privileges, or immunities secured by the Constitution . . . ."

[3] U. S. Const., Art. I, § 5, provides in pertinent part:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."